IN THE

Supreme Court of the United States

October Term, 1956.
No. 16

ALFRED E. BUTLER,

Appellant,

vs.

STATE OF MICHIGAN,

Respondent.

Motion for Leave to File Petition to Intervene, or in the Alternative, for Consolidation of Cases.

David S. Alberts, petitioner herein, alleges:

1. That he is the appellant in *David S. Alberts v. State of California,* October Term, 1956, No. 61, filed April 10, 1956.

2. In his jurisdictional statement petitioner Alberts claimed, *inter alia,* that the term "obscene" is unconstitutionally vague and unconfined and a censorial proscription of ideas and speech violating freedom of press and speech under the First and Fourteenth Amendments to the United States Constitution.

3. The Court has not yet passed upon petitioner's jurisdictional statement. From petitioner's position on the Court's calendar (No. 61) it appears reasonable that the Court may be deferring consideration of petitioner's jurisdictional statement until it has decided the instant case.

4. It appears from the excerpts of the argument in the instant case reported in 25 L. W. 3117 that the Court

was concerned with the question whether the statutory term "obscene" in a state criminal enactment is unconstitutionally vague and/or offensive to free speech. It further appears that the Court may decide or consider such question in the instant case.

5. Although petitioner Alberts in his jurisdictional statement asserts that the term "obscene" is unconstitutionally vague, the appellant Butler in the instant case took the contrary position as appears from the following colloquies reported in 25 L. W. 3117 *et seq.*:

(A) "Mr. Justice Frankfurter: You mean that 'obscene' satisfies the Winters case?

Mr. Robbins: Agreed."

(B) "Mr. Chief Justice: Does the statute say the criterion is 'obscene'?

Mr. Robbins: No—containing obscenity.

[Mr. Chief Justice]: Without the qualifying phrase (tending to incite minors to violent, depraved or immoral acts) you would think the statute is all right?

[Mr. Robbins]: Yes, provided the word 'containing' was also eliminated from the statute."

(C) "Mr. Justice Black: What does it [obscene] mean?

Mr. Robbins: There have been various meanings but I believe dirt for dirt's sake.

Mr. Justice Black: Is that a constitutional test?

Mr. Robbins: It is the best I have been able to arrive at.

Mr. Justice Black: Why is it less vague than immoral?

Mr. Robbins: I think people deal with earthy things and over years of experience get what is permissible through experience."

(D) "Mr. Justice Frankfurter: It may be a satisfactory test even though it is not as precise as an algebraic equation?

Mr. Robbins: Yes."

6. In the event the Court should determine or assume in the instant case—without adversary presentation or argument—that "obscene" is a constitutionally satisfactory standard, one of petitioner Alberts' principal issues will be seriously adversely affected.

7. Since appellant Butler did not take the position that "obscene" is unconstitutionally vague, and since this is a question of considerable importance transcending in law and reach the individual interests of the parties in the instant Butler case, and since a correct determination of this issue is vital to petitioner Alberts' interests, he respectfully requests:

(A) Permission to intervene in the instant case and to appear herein by brief on the issue of the constitutionality of the standard "obscene"; or

(B) In the alternative, for a consolidation of the two causes herein considered, namely, *Butler v. State of Michigan,* October Term, 1956, No. 16, and *Alberts v. State of California,* October Term, 1956, No. 61.

Respectfully submitted,

STANLEY FLEISHMAN,

Attorney for Petitioner David S. Alberts, Appellant in David S. Alberts v. State of California, October Term, 1956, No. 61.

WILLIAM B. MURRISH, and
BROCK, EASTON, FLEISHMAN & RYKOFF,
Of Counsel.